



Far North Queensland Medico-Legal Society
Shangri-La Function Centre, Cairns
Wednesday, 31 October 2012, 6pm for 6.30pm

The Hon Paul de Jersey AC
Chief Justice

I was very pleased when Dean Morzone invited me to speak on this occasion, originally intended simply as a gathering of the Far North Medico-Legal Society. The scope of the occasion has broadened to include other good friends from the Far North Queensland profession, but since they hear me speak far too often, I think I should retain a medico-legal focus this evening.

I spoke some years ago at a meeting of the North Queensland Medico-Legal Society in Townsville: I cannot remember what I spoke about, and no doubt neither could anyone else then present. That is the general fate of after-dinner speeches.

But the real value of these occasions rests not in the content of the guest speech, rather in bringing the two professions together for mutually beneficial exchanges. I am privileged to be the Patron of the Medico-Legal Society of Queensland, which is an active society this year celebrating its 60th anniversary. I am encouraged to see activity and interest in its sibling society in the far north.

The tendency in Brisbane has been for the guest speaker at the Society's evening events to address a topic of some substance. That trend began 60 years ago, when the after-dinner speech was given by the 9th Chief Justice of Queensland, Neal Macrossan. His topic was the "Medical and Legal Aspects of Drunkenness in Relation to Drivers of Motor Vehicles" – no doubt chastening for attendees tempted to a third glass of wine before driving home;

although that address was delivered in the early 1950s, well before the introduction of random breath testing.

But I should speak briefly about an issue of topicality for both professions. I have found that professional negligence is an enduring chestnut, not as a reflection of inadequate standards but more as a reflection of enduring concern within our professions that we should be reaching appropriately high standards.

In this context I wish to speak a little of the proceedings brought against Dr Jayant Patel. They illustrate a species of potential liability which far surpasses negligence, worrisome though that be. The prospect of criminal sanctions for inappropriately counselling a patient to undergo unnecessary surgery is of quite different order. I will speak of the approach of the High Court.

The Court of Appeal had rejected the appellant's arguments against conviction. They were first, that the section of the Criminal Code under which Dr Patel was charged was not apt to attach criminal liability to the matters established against him, and second, that a miscarriage of justice resulted from the presentation of new particulars by the prosecution approximately two thirds of the way through the trial.

The second argument was a series of interlinked points culminating in the contention that evidence admitted under particulars existing early in the trial became irrelevant to the final particulars presented two thirds of the way through the trial. The earlier particulars had alleged that Dr Patel failed to exercise reasonable skill and care in deciding to operate, and also, in the actual act of operating. The final particulars abandoned the allegations that operations themselves had been 'botched', but maintained the allegation that the operations should not have been undertaken in the first place. Dr Patel contended that evidence of his conduct in the operating theatre thereby

became irrelevant under final particulars, and that its admission prejudiced his right to a fair trial. It is in respect of this ground that Dr Patel's appeal was allowed and a retrial ordered, notwithstanding what Justice Heydon termed the trial judge's "earnest, energetic, even heroic" endeavours to address the difficulties caused by the change of particulars. That discussion, however, is largely specific to the circumstances of Dr Patel's case.

The question of broader enduring relevance is that raised by the first argument put by the appellant at his Court of Appeal hearing: whether the section of the Code under which Dr Patel was charged captured liability for negligence in deciding to operate, even if the surgery itself was performed competently.

Counsel for Dr Patel contended that section 288 only captures surgery negligently performed but not a negligent decision to operate. The case against Dr Patel was ultimately left with the jury on the latter basis: a negligent decision to operate.

Section 288 relevantly provides:

It is the duty of every person who, except in a case of necessity, undertakes to administer surgical or medical treatment to any other person ... to have reasonable skill and to use reasonable care in doing such act, and the person is held to have caused any consequences which result ... by reason of any omission to observe or perform that duty

The Court of Appeal rejected that contention and the High Court agreed. The 'act' in doing which the person must exercise reasonable care and skill is the 'surgical or medical treatment' – a term the majority held to 'encompass all that is provided in the course of such treatment, from the giving of an opinion relating to surgery to the aftermath of surgery' [paragraph 24]. Justice Heydon agreed with this assessment, but went one step further than the majority. In

his Honour's view, the 'act' may also include 'advice not to undergo particular forms of surgery or to receive particular forms of post-operative care'. By contrast, the majority were of the view that there can be no criminal liability where there is no physical act of surgery. "There can be no criminal responsibility for manslaughter or grievous bodily harm merely by the formation of an opinion or the giving of a recommendation" [paragraph 27].

Notwithstanding even that level of disagreement in our nation's highest court, this remains certain. The scope of the medical practitioner's duty of care should be clear to a point which obviates any need for litigation. As we know, however, courts have never been prepared, or sufficiently informed, to be prescriptive about that. It is simply an unachievable ideal.

Potential negligence is one thing: criminal liability quite another. The matter of abortion was for a long time a grey area. The Patel case has resolved another arguably grey area.

The High Court endeavours to remove these uncertainties: one can only hope it does so in a sufficiently certain way, and in saying that I recall the anxieties generated by decisions like *Chappel v Hart* in 1998 and *Rodgers v Whitaker* in 1992. The problem is that while principles may be formulated with apparent precision, uncertainty very often attends their application to the infinitely various factual circumstances which inevitably confront practitioners in both our professions.

Our professions maintain demanding ethical codes, and regrettably sanctions, including striking off, must sometimes be imposed. And although insurance protects against professional negligence, an adverse judgment carries a stigma, not to overlook the level of premiums. But the prospect of a practitioner's incurring criminal responsibility is of quite drastically different order. I suppose lawyers have been imprisoned for fraud committed in their professional offices. But it is obviously a doctor's contribution to the

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maintenance of human life which raises this serious prospect for the medical profession. The High Court decision again exposes the necessarily close relationship between our professions.

Tonight, I must acknowledge an undoubtedly pleasant other aspect of that relationship – its cordiality. Thank you for listening to me. May these pleasant occasions long endure!